UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13

J.P. PHILLIPS, INC.[1]

Employer

and

OPERATIVE PLASTERERS AND CEMENT MASONS INTERNATIONAL ASSOCIATION, LOCAL 5

Petitioner **CASE 13-RC-21202**

and

ILLINOIS LOCALS 56 AND 74, INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFTWORKERS, AFL-CIO;

ILLINOIS DISTRICT COUNCIL NO. 1, INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFTWORKERS, AFL-CIO;

INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFTWORKERS, AFL-CIO

Intervenors

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing on this petition was held on May 14, 2004 before a hearing officer of the National Labor Relations Board, herein referred to as the Board, to determine whether it is appropriate to conduct an election in light of the issues raised by the parties.[2]

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[1] The parties confirmed their correct legal names pursuant to a stipulation at the hearing.

[2] Upon the entire record in this proceeding, the undersigned finds:

a. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
b. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.
c. The labor organization involved claims to represent certain employees of the Employer.
d. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Sections 2(6) and (7) of the Act.

I. Issues

Local 5 of the Operative Plasterers and Cement Masons International Association (herein the Petitioner) seeks an election within a unit comprised of all full-time and regular part-time plasterers' journeymen and plasterers' apprentices who work for J.P. Phillips, Inc. (herein the Employer). Three parties intervened in this case (herein collectively the Intervenors): Illinois Locals 56 and 74 of the International Union of Bricklayers and Allied Craftworkers (herein the Local Unions); Illinois District Council No. 1 of the International Union of Bricklayers and Allied Craftworkers (herein the District Council); and the International Union of Bricklayers and Allied Craftworkers (herein the International Union).

The Intervenors and the Employer claim that a contract between the Employer and the International Union, which expires on either July 27 or August 27, 2005, bars the current petition from being processed. While the record shows there are other arguable applicable collective bargaining agreements involving the Employer and Intervenors, only the agreement between the International Union and the Employer is asserted to be a contract bar. The Petitioner denies that this contract acts as a bar to the petition. The potential contract bar was the sole issue presented by the parties at the hearing.

II. Decision

I find that the agreement between the Employer and the International Union does not bar the petition from being processed because the contract was not signed by one of the contracting parties.

Accordingly, IT IS HEREBY ORDERED that an election be conducted under the direction of the Regional Director for Region 13 in the following bargaining unit:

> All full-time and regular part-time plasterers' journeymen and plasterers' apprentices employed by the Employer from its facility currently located at 3220 Wolf Road, Franklin Park, Illinois, and excluding office clerical employees and guards, professional employees, and supervisors as defined in the Act.

III. Statement of Facts

The relationship between the Intervenors is described, in part, by the Constitution of the International Union. The District Council of the International Union of Bricklayers is composed of two or more local unions, including Locals 56 and 74. The District Council is authorized to negotiate collective bargaining agreements with employers covering work performed within the trade and geographic jurisdictions of the constituent Local Unions; in this case, the Local Unions' geographic jurisdiction is the counties comprising the Chicago metropolitan area. However, the District Council and each Local Union are separate independent organizations without the power or authority to act on

behalf of the International Union, except where such authority is expressly granted by the Constitution or in writing by the International Union's Executive Board.

The Employer is engaged in the building and construction business. In support of its business, the Employer currently employs approximately 90 to 95 plasterers. Prior to 2002, the Employer negotiated as part of the Gypsum Drywall Contractors of Northern Illinois/Chicagoland Association of Wall and Ceiling Contractors, an employer association. Through this Association, the Employer was a signatory to consecutive Section 8(f) agreements with the Local Unions.[3]

In July 2002, the relationship between the Employer and the Local Unions converted from one based on Section 8(f) to one based on Section 9(a). This conversion occurred pursuant to a previous petition filed by the Petitioner, Operative Plasterers Local 5. The NLRB conducted a mail ballot election from January 5, 2002 through February 8, 2002, whereby the Employer's plasterers chose whether they wished to be represented by the Petitioner, the Local Unions, or no union. On July 26, 2002, the Board certified Locals 56 and 74 as the exclusive bargaining representative of the plasterers. Neither the International Union nor the District Council intervened in this earlier proceeding.

Following the completion of the mail balloting but prior to the Board's certification, Stephen Nelms, an organizer for the District Council, spoke with the Employer's president, Michael Pilolla, about a potential contract between the Employer and the International Union of Bricklayers.[4] Mr. Pilolla was interested in an agreement that would permit the Employer to conduct business outside of the Chicago metropolitan area without having to negotiate a local contract in other geographic locations. Mr. Nelms suggested an "ICE Agreement," one of the International Union's form agreements would address the Employer's concern.

The International Union's general procedure for executing ICE Agreements with employers is as follows. The International Union must approve the offer of such an agreement to an employer. After approval, the proposed agreement is sent to either an officer of the local union or directly to the employer. The agreement is signed by the employer, then returned to the office of the International Union. At that point, a

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[3] The record reflects the following bargaining history between the Employer and Local Unions prior to 2002. On July 5, 1994, representatives of the Local Unions and the Employer executed a Memorandum of Understanding recognizing the Local Unions as the bargaining representative of the plasterer employees and acknowledging that the Employer was subject to an agreement negotiated with the Chicago Association of Wall and Ceiling Contractors (CAWCC). On July 1, 1997, CAWCC and the Local Unions executed another agreement which ran through June 30, 2000. Finally, on July 7, 2000, the CAWCC, the Local Unions, and the District Council executed a Memorandum of Understanding which amended and extended the July 1, 1997 agreement through June 30, 2004. However, that the record fails to establish that the CAWCC had authority to bargain on behalf of the Employer for this last Memorandum of Understanding. The Petitioner introduced a document into evidence purporting to be a June 14, 2000 letter from Rerta Burke, the Executive Director of CAWCC, listing employers including J.P. Phillips who had assigned their bargaining rights to CAWCC. However, no witness authenticated the document at the hearing, and I do not rely on the document for any finding herein.

[4] The record does not make clear why the Employer decided to negotiate new agreements with the District Council following the election, despite the Section 8(f) agreement still being valid.

representative for the International Union confirms that the employer has posted the necessary bond pursuant to the agreement. Then the agreement is sent to James Boland, the International Union's Secretary-Treasurer, for his signature on behalf of the International Union. Where a provision of an ICE Agreement conflicts with a provision in an applicable local agreement, the ICE Agreement prevails. Because ICE Agreements and other similar contracts with the International only cover work done outside the traditional jurisdiction of a local union, the employer also must enter into an agreement with the local union whose jurisdiction includes the geographic area in which the employer is actually based.

In June 2002, Mr. Nelms and Henry Kramer, a business manager for Local 74, spoke with representatives of the International Union about an ICE Agreement for the Employer. At some point in July or August 2002, Mr. Nelms informed Mr. Pilolla that the International Union, through Mr. Boland, had given its approval to offer an ICE Agreement to the Employer. Mr. Boland's office provided the ICE Agreement to Mr. Nelms to tender to the Employer after the International Union made some alterations to the Agreement to adapt it to the characteristics specific to the Employer.

On August 26, 2002, Peter Marinopoulos, President of the District Council, Trygve Espeland, Business Manager of Local 56, and Mr. Kramer of Local 74 sent a letter to John Flynn, the President of the International Union. The letter designated the International Union as the agent for the District Council and Local Unions for purposes of collective bargaining with the Employer, including the authority to negotiate collective bargaining agreements. The letter stated that the designation was effective immediately and was continuous until the expiration of any negotiated agreements.

On August 27, 2002, Mr. Nelms presented the ICE Agreement and a 1-page "Letter of Agreement" amendment to the ICE Agreement to Mr. Pilolla for execution. Mr. Nelms served only as a courier, not a negotiator, of the Agreement, and Mr. Pilolla signed the Agreement and the Amendment when Mr. Nelms presented them to him on that date. The ICE Agreement contains a line stating "Signed this 27th day of July, 2002." Mr. Nelms and Mr. Pilolla indicated that this date was in the Agreement already when Mr. Nelms presented it to Mr. Pilolla on August 27, the actual date of signature. The July 27, 2002 date—the day after the Local Union's certification as the bargaining representative—was the one the parties understood to be the effective date of the Agreement. Article I of the ICE Agreement does not include an effective date of the Agreement, but does indicate the Agreement's duration is 3 years, meaning it will extend through either July 27 or August 27, 2005. The Amendment likewise leaves blank the provision on its effective date, but indicates that the Amendment was executed on August 27, 2002.

The parties do not dispute that neither the ICE Agreement between the International Union and the Employer nor the Amendment between the International Union, District Council, Local Unions, and the Employer were signed by anyone from the International Union. The ICE Agreement contained a signature and date line for the International Union, but no signature appears on the Agreement for the International

Union. The Amendment was signed by Mr. Pilolla for the Employer; Mr. Marinopoulous for District Council No. 1; Mr. Kramer for Local 74; and Mr. Espeland for Local 56. Like the ICE Agreement, the Amendment contains a signature line for the International Union, but no signature appears on the document. Thomas McIntyre worked as an assistant to Mr. Boland from June 2001 through November 2003. Mr. McIntyre intended to give the ICE Agreement and Amendment to Mr. Boland for his signature, but he inadvertently failed to do so.

The parties also do not dispute that, since its execution, the Employer operated pursuant to the ICE Agreement for two jobs, one in Madison, Wisconsin and the other in South Bend, Indiana. This included the Employer acquiring the necessary bond in support of the Agreement; the Employer making necessary health and pension fund contributions on behalf of workers from the Madison and South Bend areas who worked on those jobs; and the Employer having a grievance filed against it by a union official from a local in Louisiana pursuant to the grievance-arbitration procedure in the ICE Agreement.

On October 1, 2002, the Employer and District Council entered into a new local collective bargaining agreement effective from that date through June 30, 2004. This agreement covered wages, benefits, and other working conditions for workers employed on jobs located within the traditional jurisdiction of Locals 56 and 74, i.e. the counties comprising the Chicago metropolitan area. Mr. Pilolla signed the agreement for the Employer, and Mr. Marinopoulous signed it for the District Council.

IV. Analysis

The Intervenors and the Employer contend that the ICE Agreement between the International Union and the Employer acts as a bar to the processing of the petition filed by the Petitioner, given that the Agreement does not expire until July 27 or August 27, 2005.[5] However, because a representative of the International Union never signed it, the ICE Agreement does not bar the petition.

If employees in the unit set forth in a petition are subject to a collective bargaining agreement, the agreement may act as a "contract bar" to the petition. *Hexton Furniture Co.*, 111 NLRB 342 (1955). To act as a bar on a petition, a contract must meet certain requirements with respect to its adequacy. *Appalachian Shale Products Co.*, 121 NLRB 1160 (1958). The contract must be in written form; be signed by the parties to the contract before the petition is filed; contain substantial terms and conditions of employment; cover employees in the petitioned-for unit; and apply to members and non-members. *Id.* at 1162-1164. In describing the requirement that a contract be signed before the petition is filed, the Board reasoned that "parties should be expected to adhere to this relatively simple requirement" and rejected any exceptions since they would make the requirement "unduly complex." *Id.* at 1162. In particular, the Board rejected an exception to the requirement in situations where parties considered an agreement

[5] Because I find that the contract is not a bar to the petition, I do not resolve the issue of what the effective date of the contract is given that the issue is moot.

properly concluded and implemented some or all of its provisions, but failed to sign the agreement. *Id.*

The Board has addressed situations where an international union was a party to an agreement but failed to sign the contract, holding repeatedly that such a contract would not act as a bar to a petition. *See, e.g., Crothall Hospital Services, Inc.*, 270 NLRB 1420 (1984); *H.W. Rickel and Co.*, 105 NLRB 679 (1953); *Filtration Engineers, Inc.*, 98 NLRB 1210 (1952). In *Crothall*, the employer negotiated an agreement with a district council which had been certified as the employees' exclusive bargaining representative following an NLRB-conducted election. 270 NLRB at 1423. Although the employer only was required to bargain with the district council, the parties agreed to add the international union as a coparty to their collective bargaining agreements. *Id.* Thus, because the international union was a party to the contract and failed to sign the agreement before the petition was filed, the Board found that the contract did not act as a bar to the petition—even though the employer had no bargaining obligation towards the international union. *Id.; H.W. Rickel,* 105 NLRB at 681 (contract not a bar to petition where international union was party to the contract, although not the exclusive bargaining representative, and failed to sign the agreement before the petition was filed); *Filtration Engineers*, 98 NLRB at 1211 (contract not a bar to petition where local union was party to contract but never signed it, despite the international union's constitution declaring that the international could execute agreements on behalf of the local).

In this case, the Intervenors assert that the ICE Agreement between the Employer and the International Union acts as a bar to the petition.[6] The parties do not dispute that the International Union was a contracting party for purposes of the ICE Agreement, even if it had not been certified as the exclusive bargaining representative of the unit plasterers. However, the Intervenors admit that no one from the International Union ever signed the agreement. Although the failure to sign the Agreement may have been a result of an innocent mistake by Mr. McIntyre, the reason for the lack of a signature is not a factor in determining if the signature requirement has been met for contract bar purposes. Similarly, the fact that the parties have been abiding by the terms of the ICE Agreement is irrelevant to the determination of whether the signature requirement has been met for contract bar purposes. The simple test is whether a signature for the contracting party appears on the face of the document. Here, the International Union never signed the ICE Agreement (or the Amendment attached thereto).

The Intervenors argue that the lack of a signature by the International Union on the ICE Agreement does not prevent the Agreement from acting as a contract bar, relying

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[6] No other contract bars the processing of the petition, and the Intervenors assert only the contract between the Employer and the International as a bar to the instant petition. Both the Section 8(f) agreement between the employer association and Local Unions and the local agreement between the Employer and the District Council executed on October 1, 2002 have expiration dates of June 30, 2004. Assuming arguendo that either of these agreements is a valid contract between the parties, neither agreement would serve as a contract bar given that the Petitioner filed the petition on April 29, 2004--or within the 60 to 90 day window period prior to the contracts' expiration in which the Board permits the filing of a petition. *Deluxe Metal Furniture Co.*, 121 NLRB 995 (1958).

on the Board's decisions in *Television Station WVTV*, 250 NLRB 198 (1980), *Holiday Inn of Ft. Pierce*, 225 NLRB 1092 (1976), and *The Bendix Corp.*, 210 NLRB 1026 (1974).[7] Each of these cases is distinguishable from this case, because they all involve factual situations where some form of a signature by a party appeared on a document. In *WVTV* and *Bendix*, the Board held that the parties' initials on an agreement or other documents were sufficient to satisfy the signature requirement. In *Holiday Inn*, the Board found that the signature of the employer's attorney on a cover letter sent with a contract proposal was sufficient to satisfy the signature requirement. In this case, only one document--the ICE Agreement and its attached Amendment--was introduced into evidence purporting to be the contract between the International Union and the Employer. The Intervenors admit that no signature appears on that document for the International Union, and did not proffer any other signature by the International Union on another document. The Intervenors' claim that the Board's signature requirement "is not applied mechanistically" simply is inaccurate. Although a signature need not appear on the actual agreement, *Holiday Inn*, 225 NLRB at 1092 and *Liberty House*, 225 NLRB 869 (1976), the Board has required some form of signature, on the contract itself or other documents, in order for a contract to bar the processing of a petition. Thus, without the signature of the International Union on it, the ICE Agreement cannot bar the petition.

Moreover, the signatures of the representatives from both the District Council and the Local Unions on the Amendment do not bind the International Union, for either the Amendment or the ICE Agreement. The face of the ICE Agreement itself makes clear that the International Union was the contracting party, and that a representative with authority for the International Union was to sign the Agreement. No one from the District Council or Local Unions had authority to bind the International Union to an agreement. Mr. Nelms admitted he was a mere courier for the International Union, doing nothing more than transferring the ICE Agreement from the International Union to the Employer. Indeed, the general procedure used by the International Union to complete an ICE Agreement reveals that it may be directly sent to an employer without going through a local union. In this case, the International Union made the changes to its form ICE Agreement and approved the Agreement prior to sending it to Mr. Nelms. Beyond this, the International Constitution establishes the District Council and Local Unions as independent parties unable to bind the International Union without express authority in writing. No record evidence exists of any such written express authority to the Local Unions. Thus, the signatures of representatives from the District Council and Local

[7] The Intervenors also cited *Georgia Purchasing, Inc.*, 230 NLRB 1174 (1975) in support of their argument regarding the lack of signature. However, that decision does not address specifically the signature requirement but instead dealt with the issues of whether telegrams between the parties constituted an agreement reflecting terms and conditions of employment and whether the parties had engaged in substantial negotiations following the telegrams being sent and received.

Unions on the Amendment to the ICE Agreement do not bind the International Union.[8]

For the reasons explained above, the ICE Agreement does not bar the petition[9].

V. Direction of Election

An election by secret ballot shall be conducted by the undersigned among the employees in the unit(s) found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit(s) who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible to vote are those in the unit(s) who were employed for 30 days or more within the 12 months preceding the eligibility date for the election, or if they have had some employment in those 12 months and have been employed for 45 days or more within the 24-month period immediately preceding the eligibility date. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12

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[8] The Petitioner further argues that the International Union did not have authority to bind the Local Unions to the ICE Agreement. However, as described above, the Local Unions designated the International Union as their bargaining agent by written letter the day prior to the execution of the agreement. Where international and local unions are autonomous, their authority and responsibility for the acts of one another are to be determined under common law principles of agency. *Carbon Fuel Co. v. Mine Workers*, 444 U.S. 212 (1979). Here, the International Union's Constitution declared that the Local Unions were separate entities from the International Union. The Local Unions were the principal in the relationship with the Employer, given that they had been certified as the exclusive bargaining representative. Thus, the Local Unions could designate their bargaining responsibility to the International Union for purposes of the ICE Agreement.

[9] Assuming arguendo that the ICE Agreement was signed, I would not find that agreement controlling for contract bar purposes. The situation herein is analogous to situations involving master/supplemental agreements. In such cases, the Board uses the agreement that covers the basic terms and conditions of employment as the applicable agreement for contract bar purposes. *Tri-State Transportation Co.*, 179 NLRB 310, 311 (1969). Herein, I would find the local agreement between the Employer and the District Council to be the basic agreement as the terms are more specifically applicable to the general operations of the Employer and that agreement is specifically between the Employer and the certified bargaining representative. The agreement between the Employer and the International Union was intended to cover the Employer's operations outside the jurisdiction of the Local Unions, is variable by its terms depending upon the applicable local agreements where the Employer is operating, and brings into effect terms and conditions of other locals who are not the certified bargaining representative. No other contract bars the processing of the petition.

months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by the Operative Plasterers and Cement Masons International Association, Local 5 or Illinois Locals 56 and 74, International Union of Bricklayers and Allied Craftworkers, AFL-CIO, or neither union.

VI. Notices of Election

Please be advised that the Board has adopted a rule requiring election notices to be posted by the Employer at least three working days prior to an election. If the Employer has not received the notice of election at least five working days prior to the election date, please contact the Board Agent assigned to the case or the election clerk.

A party shall be estopped from objecting to the non-posting of notices if it is responsible for the non-posting. An employer shall be deemed to have received copies of the election notices unless it notifies the Regional Office at least five working days prior to 12:01a.m. of the day of the election that it has not received the notices. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure of the Employer to comply with these posting rules shall be grounds for setting aside the election whenever proper objections are filed.

VII. List of Voters

To insure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is directed that 2 copies of an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of this Decision. *North Macon Health Care Facility*, 315 NLRB 359, fn. 17 (1994). The Regional Director shall make this list available to all parties to the election. In order to be timely filed, such list must be received in Region 13's Office, Suite 800, 200 West Adams Street, Chicago, Illinois, 60606 on or before **June 4, 2004.** No extension of time to file this list will be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

VIII. Right to Request Review

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street NW, Washington, DC 20005-3419. This request

must be received by the Board in Washington by **June 11, 2004.**

DATED at Chicago, Illinois this 28th day of May, 2004.

Gail R. Moran, Acting Regional Director
National Labor Relations Board
Region 13
200 West Adams Street, Suite 800
Chicago, Illinois 60606

CATS — Bars to Election: Contract

347-4040-1745-0000